V. Statement of the Case

Taxpayer Lawrence D. Sullivan, a wirelather foreman, resided in Staten Island, New York, and was employed during the year 1962 by John Melen, Inc., of New York City.

He worked at several locations within New York City. It was necessary for him to transport his tools by his car from his residence to and from work, because no means of storage was feasible at the work sites and because of the weight of the tools. Taxpayer would have driven to work absent the necessity of transporting his tools. The Tax Court allocated $136.57 of the reasonable expenses of $409.70, that is one-third to the transportation of tools, without explanation or rationale, of the Court's random selection of this ratio.

Neither of these facts are in dispute and no other facts are material to this case.

The Commissioner of Internal Revenue issued a notice of deficiency (Appendix 37a) under Sec. 6212(a) of the Internal Revenue Code of 1954 in respect of the Federal income tax of the petitioner. Consequently the basis for the Federal jurisdiction in the Tax Court of the United States is Sec. 7442 of the Internal Revenue Code of 1954.

VI. Argument

A. Reasons relied on for the allowance of the writ.

(i) There are already hundreds of cases suspended in different Federal Courts and Administrative Agencies, awaiting outcome of the present case.

The confusion inherent in the Court of Appeals decision is a lighted fuse which will lead to an explosion of cases upon the Tax Court and other Federal Courts.

(ii) The Court of Appeals has rendered in the instant case a decision in conflict with the decision of the Court of Appeals for the Ninth Circuit on the same matter in *Crowther* v. *Commissioner of Internal Revenue,* 269 F.2d 292 (Appendix 20a).

(iii) The decision of the Court of Appeals is in conflict with the position of the respondent clearly expressed in *Tyne* v. *Commissioner of Internal Revenue,* 385 F. 2d 40 (Appendix 36a).

B. The findings of the two Courts below were not concurrent.

The Tax Court originally disallowed any deductions of transporting petitioner's tools (Appendix 13a). Upon appeal the Court of Appeals allowed said deduction, but ordered that

> "The Tax Court should then determine whether taxpayer would have driven to work absent the necessity of transporting his tools, * * *. If so, it should allocate those expenses between transportation of taxpayer and of his tools and allow the latter as a deduction, * * *."

When the Tax Court upon remand and direction obeyed the order, made the determination and the allocation, the Court of Appeals upon the second appeal, by upholding the Tax Court decision only applied the rule of the "Law of the Case", *i.e.* its own former judgment.

Accordingly the second decision of the Tax Court and the second judgment of the Court of Appeals only carried out the mandate of the Court of Appeals without changing the situation, that the findings of the two Courts below were not concurrent.

C. As to the Merits.

The decisions of the Second and the Ninth Circuits are consonant as to that a worker may deduct from his taxable income the expenses of automobile transportation of his

tools, provided such transportation is necessary, because of the weight or bulkiness of said tools, plus lack of any means of safe storage at the work site. But said Courts differ, whether all, or only an apportioned part of the car expense is deductible.

1. If it is necessary to carry his tools by automobile, this disconnects the hypothetical inclination of the taxpayer, of driving or not driving by car to his work site in the hypothetical case of what he would have done absent the necessity to carry the tools.

2. The deductibility itself is unquestionably conditioned upon the necessity to carry the tools. A solution which is based on the intent of the workman, loses sight of the physical necessity which is the basis of the tax-deductibility.

3. The question is not: how would the workman go to his job site absent the necessity to carry his tools, but whether he could go in any other manner than by car, because the weight etc. of his tools. He could not. The tools must in any event arrive to the job site. Without this, the arrival of the workman is useless, naught. Whether or not the workman would use his car to transport himself, can have no bearing on a case where necessity is present for getting the tools to the job site.

4. The Court of Appeals based its judgment on the following reasoning:

> "If taxpayer had engaged someone to transport him, and paid separately for transportation of himself and his tools, the cost of transporting the tools would clearly be deductible. We see no reason why the rule should differ when the taxpayer drives himself." (Appendix 11a).

The personal aspect of taxpayer's residence becomes irrelevant, when it becomes necessary for the taxpayer to take home his tools for lack of means of safe storage at the work site, and having to do this by car, because of weight or

bulkiness of the tools. In such a case the transportation of the taxpayer's body from his residence to his work site is entirely a business matter, primarily and inextricably a matter of carrying the tools.

As the Ninth Circuit said in *Crowther* v. *Commissioner of Internal Revenue*, 269 F. 2d 292:

> "The necessity of daily transporting his tools from his layout in the woods, to Fort Bragg, for the purpose of repair or replacement, appears important to us. This was a business necessity, rather than a personal necessity. * * *
>
> The automobile and jeep were * * * property 'used in the trade or business.' The operating expenses of the automobile and jeep were 'ordinary and necessary expenses paid or incurred . . . in carrying on the trade or business of the taxpayer.' We do not believe that they could be called 'personal living or family expenses.'' The expenses were required by the exigencies of the business.

5. In any case, it is clear, that either *Crowther* is right or the judgment of the Second Circuit is right: both cannot coexist.

VII. Conclusion

For all the foregoing reasons, a writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

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